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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

ANTONIO CRAIG, Minor, by his
Next Friend and Co-Conservator,
KIMBERLY CRAIG,

Plaintiff-Appellee,

vs.

OAKWOOD HOSPITAL
a Michigan Corporation

Defendant-Appellant,
and

ELIAS G. GENNAOUI, M.D. and
ASSOCIATED PHYSICIANS, P.C.,

Defendants-Appellants,
and

HENRY FORD HOSPITAL
d/b/a HENRY FORD HEALTH SYSTEMS, and
AJIT KITTUR, M.D.

Defendants.
_____/

S.C. Nos.: 121405; 121407-09;
121419

COA Nos.: 206642; 206859;
206951
Cooper, P.J. and Sawyer and Owens JJ.
Wayne County Circuit Court
L.C. No.: 94-410338- NH
Hon. Carole Youngblood

BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS ELIAS G. GENNAOUI, M.D. AND ASSOCIATED PHYSICIANS, P.C.

***** ORAL ARGUMENT REQUESTED *****

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STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN PERMITTING PLAINTIFF'S EXPERTS TO TESTIFY IN STARK CONTRADICTION TO UNDISPUTED FACTS?

The trial court answered: "No."

The Court of Appeals answered: "No."

Defendants Elias G. Gennaoui, M.D. and Associated Physicians, P.C. answer: "Yes."

II. DID THE TRIAL COURT PROPERLY ALLOW PLAINTIFF'S EXPERTS TO TESTIFY?

The trial court answered: "Yes."

The Court of Appeals answered: "Yes."

Defendants Elias G. Gennaoui, M.D. and Associated Physicians, P.C. answer: "No."

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STATEMENT OF FACTS

This is the medical malpractice, alleged birth trauma case tried with respect to the July 16, 1980 birth of Antonio Craig. Plaintiff tried the case, inter alia, against Defendants and Appellants Elias Gennaoui and Associated Physicians, P.C., the obstetricians who delivered the child at Oakwood Hospital where the labor and delivery took place. Oakwood Hospital is also a Defendant. The verdict of the jury against Defendants was in the approximate amount of Thirty-Six Million Dollars ($36,000,000.00). See (224a-229a) (T 27, pp. 5-9). On February 1, 2002, the Court of Appeals, with minor exceptions, affirmed the jury verdict and all the Trial Court rulings in virtually all respects (2a-27a). The Supreme Court of Michigan granted Leave to Appeal on September 12, 2003. (1a)

Plaintiff's expert, Paul Gatewood, D.O., contended at the trial before Honorable Carole F. Youngblood that this infant was in fetal distress because of an alleged overdosage of a labor-inducing drug, Pitocin[1], but Dr. Gatewood's testimony was squarely contrary to the objective evidence in that the panels of the fetal monitor showed a continuous range of "fairly good" to "very good" beat-to-beat variability on the fetal monitor, indicating a lack of fetal distress. (52a, 64a) (T 10, p. 158, T 11, p. 189). Dr. Gatewood

[1] Plaintiff never contended that Dr. Gennaoui was responsible for the alleged double dosage or claimed two bags of Pitocin as it was indisputably his order that only one bag, in fact, of Pitocin was to be used. (120a) (T 15, p. 160) It is also clear that only one bag of Pitocin was, in fact, used. (118a) (T 14, p. 135)

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agreed that there was no evidence of any "head pounding" by the child on the mother's pelvic rim area because an even larger, second sibling of Plaintiff's had been later delivered by Dr. Gennaoui in Oakwood Hospital in 1987 without any incident; this undisputed fact would have been distinctly contrary to the theory of Dr. Ronald Gabriel. (56a) (T 11, p. 81) This sibling was much larger, approximately one pound larger than Antonio Craig. (67a) (T 11, p. 201) Even more convincingly, a third, even larger baby was delivered in 1989 for Mrs. Craig by Dr. Gennaoui. (57a) (T 11, p. 82) In point of fact, Dr. Gatewood conceded that Antonio Craig was a much smaller baby. (59a) (T 11, p. 154) Because Plaintiff was, indeed, a much smaller baby, there was no issue of Cephalopelvic Disproportion (CPD) [head of the baby too big for birth canal] necessary for pelvic rim contact in the present case; there was no physical claim possible that this child did not easily fit down the birth canal [and, therefore, somehow ground its head on the mother's pelvic rim.] (68a) (T 11, p. 202)

Dr. Gatewood presupposed for his part that the child in this case may have suffered a lack of oxygen, a condition known as hypoxia, but he was compelled to admit that if this, indeed, took place, then the fetus would have shown objective signs of "fetal reserve"; but there were none: the child's compensation system would have taken over, shunting blood from his nonvital organs to the heart and brain so that abnormal brachycardia and tachycardia heart rates could be seen in the child. (60a) (T 11, p. 183)

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Indicating to the contrary a lack of hypoxia, Dr. Gatewood conceded that there appeared to be no objective evidence of unusually high or low Heartbeats Per Minute to suggest either brachycardia or tachycardia. (61a-63a) (T 11, pp. 184-186) And if hypoxia took place as claimed in this case, there would have been signs of the shunting of blood from nonvital organs to the brain (65a) (T 11, p. 196) and this distress would have shown up as objective proof on the fetal monitor; but there is no loss of variability that could be seen on these fetal monitor strips. (66a) (T 11, p. 197)

Contrary to Dr. Gatewood's presupposition of hypoxia (alleged lack of oxygen to the fetal infant), Plaintiff's second expert witness, Dr. Ronald Gabriel, a pediatric neurologist, conceded that the child's APGAR scores were entirely normal at birth; this indicated no organ dysfunction, no brain swelling, nor any other objective symptoms to indicate birth abnormalities. (86a-87a) (T 13, pp. 126-127) The fact that Antonio Craig had such normal findings at birth, in point of fact, mitigated sharply against any view (advanced by Gabriel) that Defendants had caused the child's head to have pounded against the mother or against her pelvic region somehow. (86a-91a) (T 13, pp. 126-131) Gabriel was compelled to concede that Plaintiff was a very small child at five pounds, fourteen ounces. (94a) (T 13, p. 159) In light of Antonio's small size at birth, there was no objective evidence whatsoever of CPD disproportion, as this expert of Plaintiff was compelled to concede. (95a) (T 13, p. 160) And there could have been no head

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pounding (Id.)

While Plaintiff's experts disagreed somewhat, it was still clear to them that the fetal monitor strips showed good variability, accelerations on the monitor were good and fetal responses were good; the objective medical records in this case showed that the child's progress at labor was good in all verifiable respects. (104a-106a, 107a, 108a) (T 14, pp. 81-83, 87, 91)

On the day of delivery, July 16, 1980, at 6:00 p.m., Elias Gennaoui, the attending obstetrician, shut off all Pitocin; this was done personally by him at 6:00 p.m. (Medical Records, p. M22; (109a-110a) (T 14, pp. 92-93) The baby rotated normally, in the womb, as babies often do, without incident. (111a-113a) (T 14, pp. 103-105) There was no evidence of any Cephalopelvic Disproportion; indeed all of Kimberly Craig's other children were, to the contrary, actually much larger at birth and had been delivered without incident. (114a) (T 14, p. 107) There was, therefore, no evidence in this record or in this case of any CPD at all. (115a) (T 14, p. 108) The birth photo of Antonio Craig, in fact, showed a normal newborn. (161a) (T 20, p. 110)

There was no objective physical evidence of the fetal head grinding anywhere, let alone hitting against something in the birth canal of the mother. (116a) (T 14, p. 112) In fact, objectively speaking, the child's APGARS were very good indeed at scores of 9-10 when the child was first born; these are the scores of a normal

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child at birth. (117a) (T 14, p. 114)

Dr. Gatewood agreed that Pitocin was given by normal dosages according to the medical records as confirmed in the charting. (120a) (T 15, p. 160) Dr. Gatewood conceded that no CPD could be seen in this case, cutting against the core thrust of all Plaintiff's theories. (121a) (T 15, p. 170) Dr. Gennaoui, for his part, absolutely refuted Plaintiff's theory that two bags (or two dosages of Pitocin) were given the mother as claimed by Plaintiff because he personally would have seen such a "double hanging" administration of two bags; he did not. Dr. Gennaoui was one hundred percent certain that he saw that only one bag of Pitocin had been hung. (118a) (T 14, p. 135)

Dr. Bernal was the Oakwood resident in attendance at the time of this delivery. Dr. Bernal felt that the fetus had had adequate (even good) beat-to-beat variability on the monitor strips and had progressed with enough oxygen; there was no basis to believe that there was ever any apparent fetal distress on the part of the child. (122a-123a) (T 15, pp. 242-243)

Defendants' expert, Dr. Dombrowski, testified that there was no standard of care violation in this case by Defendant Gennaoui as the administration of Pitocin, according to the charting, was two milliunits; this was wholly appropriate for this delivery in 1980; there was absolutely no evidence that two bags of Pitocin had ever been hung or that there was an overdosing of the mother of Pitocin from these medical records; everything from the medical records

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looked fine and appeared to be in order. (125a-126a) (T 17, pp. 19-20)

Furthermore, as to Plaintiff's theory that Defendants were negligent in not furnishing, ordering or using or requiring an intrauterine pressure catheter equipment, which Oakwood Hospital did not have, this was not the standard of care in 1980 and was not required for obstetricians and labor and delivery nurses at that time. (127a) (T 17, p. 29) Dr. Dombrowski's review of the fetal monitor strip was wholly reassuring as to a healthy baby's being born from start to finish. (128a-130a) (T 17, pp. 30-32) As to Dr. Gatewood's theory, there was absolutely no medical evidence of hypoxia on the fetal strip. (130a) (T 17, p. 32) In point of fact, the fetal strips showed good variability. (131a-132a) (T 17, pp. 33-34) There was no evidence of shunting of blood to the brain as would have taken place during fetal distress or hypoxia. (133a) (T 17, p. 39) There was no evidence of tachycardia or brachycardia problems as would be seen if the baby was in distress as had been indicated by Plaintiff's experts. (134a) (T 17, p. 40)

There was utterly no basis for belief in these records or from any other source that the child suffered hypoxia during this birthing. (134a) (T 17, p. 40) Dr. Dombrowski testified that there was no basis for any belief that the standard of care had been violated in any way with respect to any of the treatment by Defendants Gennaoui and Associated Physicians with respect to this birthing. (135a-136a) (T 17, pp. 54-55) It was obvious from these

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records that no harm to the baby came about by virtue of this labor and delivery. (137a) (T 17, p. 58) There was no basis in the chart or for any other reason for Plaintiff's "double dose" of Pitocin theory. (138a) (T 17, p. 70)

Despite Plaintiff's experts' mutually competing theories, there was no basis for belief that this was a CPD problem birth with the child's head "grinding" on the pelvic rim. This is because, objectively speaking, this mother had, in fact, delivered two much larger babies later without **any** of the CPD problems Dr. Gabriel found. (140a) (T 18, p. 54) Throughout in the labor and delivery, the fetal strips looked excellent; the baby's baseline in the strips remain unchanged, the baseline was normal throughout and these fetal strips showed that the child sustained no trauma, no fetal distress and, therefore, no brain damage. (142a-144a) (T 19, pp. 90-92) It was very significant that larger births took place for this mother without any similar incident taking place. (145a) (T 19, p. 97)

If the baby at birth had not received the proper amount of oxygen, the baby would not have been the right color and would have been either bluish or grayish (not pinkish), would be floppy, and its APGARs would be low: none of these signs were present at Antonio Craig's birth. (146a-147a) (T 19, pp. 128-129) Furthermore, there was no basis in these medical records for belief that there was any active cyanosis which could have contributed to the child's alleged brain damage. (148a) (T 19, p. 131) There was

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repeated testimony that Defendants were guilty of no deviation from the existent standard of care prevailing in 1980. (149a) (T 19, p. 142) Contrary to Plaintiff's experts, the uterus was never hyperstimulated in this case. (150a) (T 19, p. 145) The medical records clearly indicate no problem with CPD as the mother's pelvis was described as "adequate" for birthing purposes in all medical records. (151a) (T 19, p. 146)

With respect to the "double hanging" Pitocin theory, no nurse would ever have competently hung two bags of Pitocin simultaneously because of the differing colored labels which would have alerted the rest of the nurses (or other observers) to such an overdose. (153a) (T 20, p. 11) Even if there were two nurses involved, they would not be able to double hang two bags. (153a) (T 20, p. 11)

The medical records indicated that Nurse Quinlan hung the Pitocin but this was administered through a single IVAC pump machine to be placed in the D5 Lactated Ringer solution; no other Pitocin order was ever administered by Dr. Gennaoui and there is no basis for belief that any other nurse "double hung" another redundant bag of Pitocin. (154a-160a) (T 20, pp. 62-68)

Nurse Schmidt testified that it was not possible for two bags to be hung at the same time; nurses always use the single IVAC machine as it has a pump from which there is a single channel, so it is not possible for two bags of Pitocin being put together as claimed by Plaintiff. (162a) (T 20, p. 176)

Perhaps the most significant testimony in the case came from

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Michael Nigro, the Plaintiff's TREATING pediatric neurologist. Dr. Nigro treated Antonio Craig from 1981 (164a) (T 22, p. 106) to 1993. (169a) (T 22, p. 128) He diagnosed Antonio Craig as a nonprogressive encephalopathy, a brain disorder which was not progressing. (165a) (T 22, p.107) Having treated Antonio Craig for the first thirteen years of his life, Dr. Nigro's view was that it was simply not possible for Antonio Craig to have been mentally retarded due to an hypoxic event at birth. (166a-167a) (T 22, pp. 113-114) The actual cause of Antonio Craig's problem was of some unknown origin. (168a) (T 22, p. 117) It would have been impossible for the neurological problems suffered by Antonio Craig to have been derived from trauma or hypoxia during the labor and delivery according to his longstanding treating neurologist. (170a-171a) (T 22, pp. 129-130)

To the extent that a cause of Antonio's problems could be identified, Dr. Nigro believed that there may have been a congenital disorder dating from the first trimester of Antonio Craig's gestation (172a) (T 22, p. 138), long before the birthing incident, and, therefore, not in any way because of alleged medical malpractice. In 1993, a Magnetic Resource Imaging (MRI) film was taken of Antonio Craig; Dr. Nigro ordered the MRI and, upon review, that MRI showed **no** hypoxia or trauma which could have caused the brain damage. (173a-178a) (T 22, pp. 145-150)

Dr. Nigro found no evidence of birth trauma in these records; no signs of cortex injuries; no brain damage, not a trace of it, on

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the MRI. (180a) (T 23, p. 48) If there had been any birth trauma in this case, the child's fontanel would have been impacted: nothing was visible. (181a) (T 23, p. 49) From Dr. Nigro, who **TREATED** Antonio Craig for the first thirteen years of his life as a pediatric neurologist, all indications are that the injury took place early in the pregnancy, long before the birth, (not due to alleged medical malpractice). (182a) (T 23, p. 53)

Dr. Donn testified that there could never be an exact pinpoint as to when the damage took place, when the damage was done or when the condition arose. (184a) (T 24, p. 16) There was absolutely no basis to ascribe Plaintiff's present condition to the labor and birthing as nothing in the birth records, nothing in the early pediatric records, and nothing known from all of the objective records indicated that this happened at the time of labor and delivery; most probably, the injury to Antonio Craig happened in utero, before delivery. (185a) (T 24, p. 17) There were, in fact, no abnormalities in any of the medical records recording the birth which could be seen. (185a-186a) (T 24, pp. 17-18) There was certainly no evidence of hypoxia. (187a) (T 24, p. 19) There was no proof of a shunting of blood from the nonvital organs to the heart and brain, essential clues for a finding of hypoxia. (188a) (T 24, p. 20)

If there had been brain damage, there would have been interference with Antonio's ability to urinate or feed himself. (188a) (T 24, p. 20) There was no such evidence of that inability.

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(188a) (T 24, p. 20) If there had been hypoxia or brain damage, there would have been a floppy, "rag doll" effect for Antonio in his posture which was not present. (189a) (T 24, p. 21) There was no evidence of external trauma shown which would have been necessary for Plaintiff's theory to prevail. (189a) (T 24, p. 21) There was no evidence of subdural hematoma. (190a) (T 24, p. 22) There was no demonstrated trauma to this child. (190a) (T 24, p. 22) There was no indicia of trauma on the 1993 MRI. (190a-191a) (T 24, pp. 22-23) There is no basis to link the cerebral palsy of Antonio Craig to the birthing, labor and delivery process in any way. (191a)(T 24, p. 23) The fontanel was not bulging; there is no harm shown to the fontanel, and this was a necessary precondition to Plaintiff's theory. (192a-193a) (T 24, pp. 28-29) There was no evidence of subdural hematoma. (193a) (T 24, p. 29) There was nothing to suggest brain damage due to hypoxia - or even, hypoxia. (194a) (T 24, p. 30)

The verdict of the jury awarded roughly Thirty-Six Million Dollars ($36,000,000.00). (224a-229a) (T 27, pp. 5-9) On July 10, 1997, the Judgment was entered in the approximate amount of Twenty-One Million Dollars, ($21,000,000.00) after being reduced to present cash value. (See 28a-31a, Judgment on Jury Verdict, July 10, 1997)

After various Post-Trial motions were argued and decided (230a-306a) (T 8/29/97, pp. 4-79), a Claim of Appeal was filed on a timely basis with the Michigan Court of Appeals and the Wayne

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County Circuit Court. On February 1, 2002, a Panel of the Court of Appeals, consisting of Judges Jessica R. Cooper (who authored the Opinion reported at 249 Mich App 534, 643 NW2d 580), Donald S. Owens and David Sawyer, affirmed the massive jury verdict and virtually all of the rulings of the Trial Court, Honorable Carole F. Youngblood. (2a-27a)

It should be noted that extensive, additional record citations are found within the Argument Section of the Brief.

Upon the granting of Leave to Appeal (1a), the within Appeal before the Michigan Supreme Court now follows.

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I.

WHETHER THE TRIAL COURT ERRED IN PERMITTING PLAINTIFF'S EXPERTS TO TESTIFY IN STARK CONTRADICTION TO UNDISPUTED FACTS.

While it can be argued that this is a case of "Junk Science", we can argue, with great confidence, that the Trial Court and the Court of Appeals utilized "Junk Law" to sustain a spurious medical malpractice action riddled with expert testimony so disparate from legitimate science and so defiantly impertinent to the irrefutable facts that the legal rulings sustaining the Thirty Six Million Dollar ($36,000,000.00) Jury Verdict below can only be described as profoundly illicit.

To repeat the undisputed facts briefly, Plaintiff's APGAR scores at birth were normal. His body at birth was much more small than his larger siblings who themselves experienced no problem in the birth canal; there was, therefore, no evidence of CPD. The two experts performed an "After-You-Alphonse-No-After-You-Gaston" intellectual temporizing skit on the claimed hypoxia demonstrating utterly no basis for a hypoxia finding.

Dr. Nigro, the treating pediatric neurologist did not agree that this was a birth trauma, as he felt that Plaintiff's problems began long before birth. The fetal monitor results and strips were good throughout the birthing process. There were no signs of "fetal reserve" indicating hypoxia. No signs at birth indicated fetal distress. The child was "pinkish," not blue, at birth, as would indicate hypoxia or trauma. The medical records clearly

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indicated only one bag of Pitocin was administered. The birth photo of the child showed a normal birth. The fetal monitoring strips were all normal. There was no finding of cyanosis. A 1993 MRI showed no hypoxia or trauma as of that point which could have caused brain damage. There were no signs of cortex injuries. The APGAR scores were normal, unlikely if there were birthing trauma.

In short, there were utterly no facts which supported the view of either hypoxia or traumatic grinding, both views of which were monolithically contradicted by the undisputed facts.

So how did Doctors Gatewood and Gabriel become empowered to testify with their rather outrageous views which, squarely contrary to these known facts, were based on "Junk Science"? Again, the lower courts' refusal to border these unusual experts in their unfounded opinions fatally injected "Junk Law" into the case.

DISCUSSION

It is the sine qua non of Michigan medical malpractice law that the negligent actions allegedly demonstrated on the part of the medical Defendants constituting the violations of the applicable Standard of Care must be proven, to the civil preponderance degree, to have "proximately caused" the injuries of which complaint of a breach of standard of care is made. Paul v Lee, 455 Mich 204, 216-217, 568 NW2d 510 (1997) (overruled on other grounds, Smith v Globe Life Ins. Co., 460 Mich 446, 597 NW2d 28 (1999)). Ghezzi v Holly, 22 Mich App 157, 177 NW2d 247 (1970). In the law of medical malpractice, where the plaintiff proposes a

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factual theory of causation and there are also competing exculpatory theories which would render the defendants nonliable, any jury verdict in favor of plaintiff must be set aside as conjectural when plaintiff's evidence has not been narrowed to make the theory of liability more probable than the theory of nonliability. See Nicholson v Children's Hospital of Michigan, 139 Mich App 434, 363 NW2d 1 (1984), lv den, 421 Mich 854.

STANDARD OF APPELLATE REVIEW

Because we are seeking Judgment Notwithstanding the Verdict, the review is undertaken de novo. See Meagher v Wayne State University, 222 Mich App 700, 708, 565 NW2d 401 (1997) (directed verdict). In Michigan law, the seminal case as to the appellate review of causation is Kaminski v Grand Truck Western Railroad Company, 347 Mich 417, 79 NW2d 899 (1956) which holds that the Court must grant Judgment Notwithstanding the Verdict on appeal in a case when, as here, the Plaintiff proposes several alternative theories of causation of the injures, some of which impose liability and some of which do not, but fails to adduce evidence which makes the liability hypothesis more likely than the rest. This means the jury is able to engage in freefloating decisionmaking, free to attach liability as a matter of sheer conjecture, selecting one freefloating, just-as-likely theory or the other without any of the theories existing in the proofs. Only by becoming more likely by a "preponderance" as understood by adherence to the civil law can a plaintiff reach the jury. If this

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is demonstrated, as here, the appellate court will reverse. Kaminski, supra.

More recently, the Michigan Supreme Court revitalized this speculation rule in Skinner v Square D Co., 445 Mich 153, 516 NW2d 475 (1994). There the Supreme Court held that when there are competing, equipoised causation theories, the case cannot be properly submitted to the jury because the preponderance of the evidence must be focused upon the theories of liability so that Plaintiff's theory of liability becomes more likely than not as the cause-in-fact for the claimed tort. Again, this is the duty of the reviewing court to assess under Skinner.

Under Kaminski and Skinner, this process is known as the "selective application" evidentiary process, i.e., plaintiff is required, by a more-likely-than-not "preponderance" in the proofs, to show by "selective application" that the theories of causation tip in plaintiff's favor; if not, defendant is entitled to Directed Verdict or, if there has been an adverse jury verdict, a Judgment Notwithstanding the Verdict. In medical malpractice cases, juries are not permitted to speculate on how the plaintiff received his or her injuries. Nicholson, supra. This, then, is the Standard of Appellate Review.

A review of this record, even taken in the light most favorable to Plaintiff, demonstrates a total confusion on the part of Plaintiff's two expert witnesses, Dr. Paul Gatewood and Dr. Ronald Gabriel, who, simply put, singularly or between them, could

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not converge together on a sensible, unified causation theme which relied upon the actual facts of the case or which remotely justified sending this case to the jury. This analysis now follows.

TWO CONFUSED EXPERTS

Dr. Gatewood believed that Antonio Craig's injuries came about when Mrs. Craig's uterus was allegedly hyperstimulated by an alleged overdose of Pitocin. Dr. Gatewood described that process at (47a-49a), T 10, pp. 128-130 at which Dr. Gatewood suggested that if the uterus is hyperstimulated, if the resting tone of the uterus does not have a chance to become relaxed, there may be prolonged reduction of oxygen to the baby and the baby might suffer hypoxia, or lack of oxygen. (47a-49a) (T 10, pp. 128-130) But Dr. Gatewood, however, refused to take offer testimony as to for whether, in fact, this assumed hypoxia, if it really existed, **actually** caused the injuries to the child. At (49a) T 10, p. 130, Dr. Gatewood also candidly agreed that he was not competent to make this determination. Significantly for our purposes, Dr. Gatewood said:

> "And does it reach a certain point where that degree of reduced oxygen makes a difference? **My neurology colleagues say yes.** **I WOULD DEFER TO THE PEDIATRIC NEUROLOGIST TO SAY IF IN THIS SITUATION THERE WAS SUFFICIENT HYPOXIA THAT WE KNOW** existed to cause necessary central nervous problems that this child suffers from. **I am not a neurologist and I'm not here to discuss that. . . .**" (49a) (T 10, p. 130) (Emphasis and capitals supplied.)

Dr. Gatewood was insistent that only a pediatric neurologist,

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and not he, could ever properly and competently determine whether the assumed hypoxia could, in fact, be the cause in fact of Antonio Craig's retardation. Dr. Gatewood testified repeatedly that he would not assess whether the purported hypoxia, if it existed, caused the alleged brain damage. See (50a, 58a) T 10, p. 131, T 11, p. 153. Dr. Gatewood testified that the situation looked like hypoxia to him as he conducted his Obstetrical Record Review but, ultimately, he was not able or competent to say that, if there were, indeed, hypoxia, there was damage caused if this hypoxia took place. (50a) (T 10, p. 131) Dr. Gatewood is not a neurologist. (50a) (T 10, p. 131) The **causation** finding must be the subject of review by the pediatric neurologist, not by him, he swore. See (58a) (T 11, p. 153.)

Defendants registered a lengthy objection to whether the witness, by his own admission, was, therefore, not competent even to testify on hypoxia as that related only to the area of expertise of the pediatric neurologist. The Trial Court overruled that objection at (54a-55a) T 11, pp. 13-14. That ruling was strange, because, significantly, Plaintiff's counsel himself at (69a-70a), T 11, pp. 208-209, admitted that Dr. Gatewood was not qualified to render an opinion on such issues of pediatric neurology. It was agreed that Gatewood was not competent to make this finding and the issue of the causation of the retardation must be addressed to the neurologist (Dr. Gabriel) to determine whether there was alleged damage caused from the assumed hypoxia. (67a) (T 11, p. 210)

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Pediatric neurologist Ronald Gabriel, M.D. was equally inconclusive when it came his turn. Gabriel found brain damage on the part of Antonio but this conclusion was based, largely, on Magnetic Resource Imaging (MRI) films taken in 1993; these were taken long after the 1980 birth; Plaintiff's expert freely admitted that the MRI films did **not** show **when** the brain damage took place. See (92a-93a) (T 13, pp. 156-157) The damage to this child could, indeed, have taken place at any time. (92a-93a) (T 13, pp. 156-157) Gabriel's causation theory was based upon this MRI, in part. (73a) (T 13, p. 17) The lack of symmetry found in the MRI by Gabriel was proof of brain damage at (73a-74a), T 13, pp. 47-48. Damage is shown on the right side. (74a) (T 13, p. 48) Dr. Gabriel found no symmetry on the right side in the MRI. (75a) (T 13, p. 49) The MRI shows an "asymmetrical" picture. (76a) (T 13, p. 50) Again, Gabriel cheerfully admitted that the 1993 MRI could not tell him **when** the brain damage he claimed to have found actually took place or occurred. (79a-80a) (T 13, pp. 97-98)

Dr. Gabriel also admitted that it was "very difficult" to posture late global hypoxia ischemia during labor and delivery because all of Antonio Craig's APGAR scores at birth were, to the contrary, normal in every way. (84a-85a) (T 13, pp. 121-122) Upon reflection, Dr. Gabriel was even more definite than that: he found no global hypoxia ischemia in this child although he did find that there was minor localized ischemia. (85a) (T 13, p. 122) There was no evidence that this child had suffered global hypoxia ischemia,

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See (87a-88a) (T 13, pp. 127-128) (which was necessary for a finding of brain damage). On cross-examination, Dr. Gabriel admitted that no hypoxic event had been shown. (91a) (T 13, p. 131)

It was Dr. Gabriel's alternative view, contrary to that of Dr. Gatewood, that Antonio's fetal head had somehow ground in the pelvic area during the labor and delivery. (97a-98a) (T 13, pp. 162-163) But, Dr. Gabriel agreed he was not competent to say whether this "head grinding" was accomplished by a violation of the obstetrical standard of care or was in any way caused by "too much" Pitocin; the dosage amounts for Pitocin were strictly obstetrical issues which were beyond his area of competency and expertise (77a) (T 13, p. 81) and the obstetrical niceties of the "head grinding" theory was admittedly beyond his expertise. (96a-102a) (T 13, pp. 161-167) The use of the Standard of Care as to the use of Oxytocin is strictly an obstetrical issue and Gabriel refused to speak to it. (78a)(T 13, p. 82) Dr. Gabriel refused to speak to the Pitocin obstetrical issue as it was beyond his competency and he repeatedly refused to do so throughout the trial. (81a, 82a, 83a)(T 13, pp. 99, 105, 109) Dr. Gabriel apparently suspected that the child had ground its head on the mother's pelvic rim but he refused to demonstrate how that "pounding" took place as these were questions of maternal anatomy and he was not competent to answer them as he was not an obstetrician. (96a) (T 13, p. 161)

Dr. Gabriel refused to answer any questions about the pelvic outlet issue he raised at T 13, p. 162. Gabriel was unable to

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answer any aspects of pelvic anatomy and declined to support his own theory accordingly. (97a-98a) (T 13, pp. 162-163) While Dr. Gabriel suspected that the baby had somehow ground its head against the pelvic rim of the mother, he flatly refused to say what part of the fetal head ground against what part of the mother as he refused to be drawn into that obstetrical anatomy question, which was beyond his competency. (97a-98a) (T 13, pp. 162-163) Dr. Gabriel was unable to say professionally upon what and whether the child ground its head upon and refused to answer any of these questions as they related to obstetrical issues. (100a-102a) (T 13, pp. 165-167)

In short, contrary to Dr. Gatewood's unproven presupposition, hypoxia, did not take place in this case, according to the testimony of Dr. Gabriel. Dr. Gatewood said that only Dr. Gabriel could make that assessment and Dr. Gabriel stated quite clearly that no hypoxic event existed here. Dr. Gabriel, for his part, said that he believed that the child may have ground its head on the pelvic rim of the mother, but he claimed no violation of the obstetrical Standard of Care and was unable to relate this "grinding" in any way to the administration of Pitocin. Just as importantly, by his own admission, Gabriel was incompetent to ascertain whether the child's head ground on the mother's pelvis as these were, at bottom, obstetrical issues relating to maternal anatomy which, again, he was not competent to speak to and refused to discuss. (77a, 96a-102a) (T 13, pp. 81, 161-167) Above all else,

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Dr. Gabriel found no hypoxia as the cause of the brain damage as the child's APGARS clearly indicated a normal delivery.

PRESERVATION OF THE ISSUE

Not surprisingly, a vigorous Directed Verdict Motion was registered at trial by Defendants on this precise issue because of these wholly inconclusive components of expert testimony. See (195a-219a) (T 25, pp. 77-100; Counsel for Gennaoui and Associated Physicians, P.C., joined this Motion at (202a) T 25, p. 83 and (54a-55a, 69a-71a) see T 11, pp. 13-14; 208-210.) There was an inherent inconsistency between Dr. Gatewood's belief that this child's brain damage came about because of hypoxia and Dr. Gabriel's view that there was no hypoxia. (Indeed, Gatewood said that he was not competent to make that assessment and Dr. Gabriel's view was that no hypoxia took place.) In the face of this inconclusive mishmash, Judge Youngblood still denied the Directed Verdict Motion at (220a-223a) T 26, pp. 6-8. An identical, extensive Judgment Notwithstanding the Verdict Motion on this precise ground was also filed pursuant to written Briefs and oral arguments (232a-236a, 239a-241a, 241a-246a, 250a-252a) (T 8/29/97, pp. 5-9; 12-14; 14-19; 23-25) and these Motions were also denied. (239a-241a, 250a-252a) (T 8/29/97, pp. 12-14; 23-25) The issue is thus fully and fairly preserved for appellate review.

THE FACTS REVIEWED, AGAIN

There was utterly no legal basis for submission of this case to the jury as the uncontradicted facts were all in Defendant's

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favor. Dr. Gatewood wholly deferred to Dr. Gabriel as to the causal effect which his assumed global hypoxia would have had with respect to the alleged brain damage on the child. Dr. Gabriel, in turn, found no global hypoxia. This diametrically opposed, internal inconsistency puts two competing liability theories before the jury making Plaintiff's case of causation a raw conjecture and totally inconclusive. Furthermore, Dr. Gatewood himself agreed that the beat-to-beat variability of this fetus as shown by the fetal monitor strip was quite good, which meant the child was not in distress. See (52a) (T 10, p. 158) It was admitted that CPD (Cephalopelvic Disproportion) was not an issue in this case as a larger second child was delivered by Dr. Gennaoui in 1987 thereby indicating no CPD problem in the mother for this smaller child. See (56a, 67a) (T 11, pp. 81, 201) In fact, a third baby, even larger, was born to Mrs. Craig in 1989. See (57a) (T 11, p. 82) In terms of size, Antonio Craig was a small baby, so agreed by all experts. (59a) (T 11, p. 154) Without CPD proven, the "grinding" issue was a nonstarter.

If the fetus ever went into hypoxia, the fetus would have gone into "fetal reserve", the body's compensation system taking over either resulting in abnormal heart beats, brachycardia or tachycardia, none of which ever happened. (60a) (T 11, p. 183) At no time did the fetus exhibit tachycardia or hearts per minute at a greater rate of more than 160. (61a-63a) (T 11, pp. 184-186) There is always the shunting of blood from nonvital organs to the brain

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during hypoxia. (65a) (T 11, p. 196) This defense mechanism did not happen as there was no loss of variability on the fetal monitor. (66a) (T 11, p. 197) CPD was never an issue in this case at T 11, p. 202. Hypoxia and "fetal grinding" were never substantiated sufficiently to submit this case to the jury.

For his part, Dr. Gabriel admitted that at the time of Antonio Craig's birth, there were normal APGAR scores; there were no signs of organ dysfunction, no brain swelling, nor any of the other symptoms which would have indicated brain damage was present in the child at birth. (86a-87a) (T 13, pp. 126-127) This child at birth was very small at five pounds, fourteen ounces. (94a) (T 13, p. 159) There was, therefore, no evidence of CPD in the mother necessary for a "fetal grinding" thesis. (95a) (T 13, p. 160) Dr. Gabriel refused to find global hypoxia in this case and he was compelled to agree at (86a-91a) T 13, pp. 126-131 that the normal findings for Antonio upon his birth did not support his assumed supposition that Antonio Craig's head was pounding on his mother's pelvic rim; this was a thesis which **never** was attributed by Dr. Gabriel to any of the Defendants because he refused to deal with obstetrical issues in any way. (77a, 78a, 81a, 82a, 83a, 96a) (T 13, pp. 81, 82, 99, 105, 109, 161)

What is presented for this Court, even in the light most favorable to Plaintiff, is a wholly inconclusive causation case, the gaps of which were never filled in by either Dr. Gatewood, the obstetrician who insisted that his assumed hypoxia resulted in

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brain damage but only if the pediatric neurologist said so, which Dr. Gabriel did not, or Dr. Gabriel, the pediatric neurologist, who found no hypoxia in the first place and said the child's head ground on the mother's pelvic rim, but left to the obstetrical expert, Dr. Gatewood, who never said so. This left causation an endless loop with no possible resolution which could be made in favor of Defendants' alleged malpractice.

What, then, was the actual cause of Antonio's mental retardation? His lifelong **TREATING** pediatric neurologist, Dr. Michael Nigro testified, from his 13 years of experience in treating Plaintiff, that the cause of Mr. Craig's brain damage may have been a congenital disorder (and certainly **not** malpractice) and that this tragic event probably took place in the uterus, during the first trimester of Antonio Craig's fetal being. (172a) (T 22, p. 138) Dr. Nigro was definite in any event that it was <u>impossible</u> for neurological problems to have been the result of unproven trauma or hypoxia based upon his treatment of Antonio Craig for many years. This solid testimony is Plaintiff's own lifelong neurological <u>treater</u>. (170a-171a) (T 22, pp. 129-130)

This means, finally, that there are several sharply competing causation theories as to how Antonio Craig's mental retardation came about. Clearly, Plaintiff's Gatewood/Gabriel conclusions were never properly finalized and remain, even today, open, unproven hypotheses, not reduced to a single likely cause. There are a host of irrefutable facts which blow the contradictory hypotheses of

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these experts out of the Courtroom. The expert witnesses themselves chosen by Plaintiff to testify were utterly unable to narrow their theories to a probative more-likely-than-not conclusion. This raises, once again, the result required by the famous Kaminski rule found at 347 Mich at 422:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination notwithstanding the existence of other plausible theories with or without support in the evidence."

We now see that the most probable proof of causation was Dr. Nigro's exculpatory thesis as the **treating** physician of Plaintiff that this injury took place, if at all, in the first trimester, long before the birth. Because the theories of Dr. Gatewood and Dr. Gabriel were totally inconsistent and massively at odds with each other, the Trial Court should never have allowed this case to go to a jury to render a Thirty-Six Million Dollar ($36,000,000.00) verdict. A Directed Verdict should have been granted. (195a-219a, 202a) (T 25, pp. 77-100; T 25, p. 83) The Judgment Notwithstanding the Verdict requested below on this precise ground was denied by the Trial Court and this was patent error. An egregious legal error was committed; it must be corrected on appeal.

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The Michigan Supreme Court has repeatedly sternly warned Bench and Bar against allowing "half-baked" legal theories to be submitted to the jury as even a favorable verdict will be taken away if the causation theories of the Plaintiff do not take preponderance shape in the evidence. Paul v Lee, supra; Skinner v Square D Co., 445 Mich 153, 516 NW2d 475 (1994); and see, also, Nicholson v Children's Hospital, 139 Mich App 434, 363 NW2d 1 (1985). Under these circumstances, the verdict of the jury must be obliterated and Judgment Notwithstanding the Verdict on appeal be entered forthwith in favor of these Defendants.

As to the Supreme Court's first question, to be answered on Leave Granted, indeed, the testimony of Doctors Gatewood and Gabriel, chaotic, inconsistent with the known facts, fatally at odds with each other, was wholly improperly submitted to the jury. Without these wholly inconclusive "experts" testifying, Plaintiff's case cannot be salvaged. Defendants Elias Gennaoui and Associates Physicians, P.C., respectfully request that Judgment Notwithstanding the Verdict be entered on appeal.

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II.

WHETHER THE TRIAL COURT PROPERLY ALLOWED PLAINTIFF'S EXPERTS TO TESTIFY.

Because of Defense Appellate Counsel's pressing schedule, Appellate Counsel for Defendants and Appellants Elias G. Gennaoui, M.D. and Associated Physicians, P.C., could not meet the original briefing schedule set by the Supreme Court. Having filed our Brief before the Supreme Court after the other briefs, however, gives Defense Appellate Counsel the benefit of scanning all the other parties and Amici Curiae brief, but also leaves him with the disadvantage, in effect, of playing intellectual Anchor Man, with the onus of not repeating what others have said.

To that end, Defense Appellate Counsel would like to "pull together" two concluding points which entirely bulwark the excellent briefing already offered on the defense side which is presently before the Court and yet to do so in a fresh way.

A: HARMONIZING DAUBERT, MRE 702 AND MRE 702 AS AMENDED, MRE 703 AND MRE 703 AS AMENDED, AND MCLA 600.2955

First of all, the core thrust of MRE 702, as originally promulgated and as amended in September, 2003, of MRE 703 as originally promulgated and as amended effective January, 2004, the seminal case of Daubert v Merrell Dow Pharmaceuticals, 509 US 579, 113 S.Ct 2786 (1993) and of MCLA 600.2955, and its legislative history[2], all resoundingly center around one unitary theme: the

[2] The Senate Fiscal Agency Legislative Analysis, sb344/9596, page 6 of 17 specifically noted that, "In an action alleging medical malpractice, these provisions [MCLA 600.2955] would be in addition to, and would not otherwise affect the criteria for expert

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judicial policy of this State is to demand secure testimonial **reliability** in the area of expert proofs or as a prerequisite to admissibility. Put another way, the sine qua non, inexorable requirement that the expert testimony be, at once, "reliable" and, once again, with absolute precision, be narrowly tailored to the existent facts parallel to the existing evidence (usually, described as the "fit" requirement) are the fundamentally important obligations of the "gatekeeping" Courts faced with admitting or rejecting the opinion evidence of experts.

In the area of medical expert testimony relating to causation, within the context of medical malpractice and/or medical devise products liability claims, under Daubert and FRE 702 and 703, the results are consistently the same. Medical causation testimony is generally not deemed sufficiently reliable for admission into evidence where the medical expert has engaged in "unusual" diagnostic, medical causation techniques that initially fail to rule out other causes for the medical condition which are also suggested by the evidence. To the extent that the proffered expert does not advance a good explanation as to why the expert's conclusions indicating liability remains reliable when he or she has failed to exclude other possible causes for the medical result, the experts' conclusions remain inadmissible conjectures, only. An expert who fails to negate other areas equally plausible[3] to

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testimony specified in the RJA [e.g., MCLA 600.2169] for medical malpractice cases.

[3] As will be demonstrated below, the astounding lack of testimonial responsibility between Dr. Gatewood and Dr. Gabriel in

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explain medical consequences, causation runs afoul of FRE 702 considerations and Daubert. Alexander v Smith & Nephew, PLC, 98 F.Supp2d 1310 (DC Okl 2000) citing In Re: Paoli Railroad Yard PCB Litigation, 35 F3d 717, 761 (3rd Circuit 1994).

Consider Domingo v T.K. MD, 276 F3d 1083 (9th Cir, 2002), typographical errors corrected, 289 F3d 600 (9th Cir, 2002). In Domingo the patient suffered severe brain damage following hip surgery which plaintiffs attempted by expert testimony to link to the surgical event. The District Court excluded plaintiff's expert testimony concerning the cause of the brain damage. After lengthy hip replacement surgery, plaintiff Domingo suffered from a rare condition known as Fat Embolism Syndrome, went into a coma and suffered severe brain damage. Fat Embolism Syndrome is a rare condition that is a known, but calculated, risk of hip replacement surgery. Fat embolae are released into the blood which then carry fat particles throughout the body, ultimately depositing themselves into the brain which, in very unusual circumstances, can lead to brain damage or death. It is not known why a few patients suffer from Fat Embolism Syndrome and others do not. As here, causation for the severe mental retardation of the plaintiff was the central causation question dedicated to the expert testimony.

Noting in medical malpractice cases that the trial court must act as a "gatekeeper" for purposes of excluding "junk science" and

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each leaving to the other conclusions regarding hypoxia makes this an After-You-Alphonse-No-After-You-Gaston routine which resulted in a total speculation going to the jury.

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applying that role to medical malpractice actions that do not meet the test of reliability required under FRE 702, the Domingo court articulated from Daubert a non-exhaustive list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence. These criteria include:

- 1) whether the scientific theory or technique can be (and has been) tested;
- 2) whether the theory or technique has been subjected to peer review and publication;
- 3) whether there is a known or potential error rate and;
- 4) whether the theory or technique is generally accepted in the relevant scientific community[4].

While Domingo is not an alleged "birth trauma" medical malpractice case, from the perspective of medical causation of brain damage, it follows the thinking necessary to condemn Dr. Gatewood's belief that hypoxia was involved in the brain damage of

[4] Much has been written in this case by other members of the Defense Team who have pointed out that Dr. Gabriel was unable to point to any scientific literature except those citations vaguely named which could not be verified. From the record, we see, in effect, that the idea that there is a "pounding" or "grinding" of the head of infants onto the pelvic rim in a birth mother whose birth canal is so large from previous births and in light of no Cephalo-Pelvic disorder (CPD) that there could be no such pounding, to be blunt, is Virtual Witchcraft, not validated by peer review or the scientific community and not subject to a known or potential error. Since Dr. Gabriel's scientific theory cannot have been tested, whether there is no publication on the subject and is rejected by virtually everyone in the field, there is no known or potential error rate, and whether the theory or technique is generally accepted within a relevant community, which has condemned it, means that Dr. Gabriel's ipse dixit and his medical solipsism must be rejected whether Daubert, MRE 702/703 or MCLA 600.2955 or the prevailing preexisting common law in place in 1980 are examined.

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this child but left it to Dr. Gabriel to conclude. For his part, Dr. Gabriel's view that hypoxia was not involved but the "pelvic grinding" was subject to obstetrical testimony, which Dr. Gatewood did not provide, provided a frustrating open loop.

When should a trial court willingly engage in a Davis Frye[5] or Daubert hearing under MRE 104? Try, "always" as the correct answer. The most sensitive of the areas in medical malpractice, beyond the Standard of Care questions, obviously, are generally medical causation questions and, customarily, challenges to the scientific reliability of such causation testimony should ordinarily be addressed prior to trial under MRE 104 as an early evidentiary challenge because that early opportunity allows the trial judge to exercise properly the "gatekeeping" role regarding expert testimony envisioned under Daubert. See Hose v Chicago Northwestern Transportation Company, 70 F3d 968, 973 (fn 3)(8th Circuit 1995) and Robinson v Missouri Pacific Railroad Company, 16 F3d 1083, 1089 (10th Circuit 1994). Daubert itself envisioned an early hearing before trial to allow the court to exercise its gatekeeping role properly. Daubert, 113 S.Ct at 2798. In this area, the federal rules appear to be superior to the Michigan rules in that, under FRCP 16 (C)(3) and (4) a strong policy directive is mandated for the trial court to engage in this examination long before trial gets under way.

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[5] People v Davis, 343 Mich 348, 72 NW2d 269 (1955); Frye v United States, 293 F 1013 (CA DC 1923)

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While Judge Youngblood may have engaged in precedent-shattering[6] judicial lassitude in ducking the requested Davis-Frye hearing (32a-45a)(T 6, pp. 8-20), leaving to **Defendants** to prove Plaintiffs' experts were not qualified, even in states which do not accept Daubert in the formal sense, like Michigan, still strongly mandate pretrial hearings like Davis Frye. This is especially true in medical causation cases, whether medical malpractice or products liability. Dipetrillo v Dow Chemical Company, 729 A2d 677 (R.I. 1999) (recognizing the rule). See, also, Santos v Fischer, 2003 WL 22048777 (R.I. Super. 2003) (medical malpractice action relating to medical causation) (307a-309a).

In one of the very few cases that can be found in which an appellate court has tested neonate medical malpractice causation under both the Frye and Daubert test, consider Daniels v Hospital of Philadelphia College of Osteopathic Medicine, 2001 WL 1044900, 52 Pa. D&C 4th 233, affirmed, sub nom, Daniels v Hospital of Philadelphia, 797 A2d 378 (Pa. App. 2002) (310a-314a). There, plaintiff's expert took the position that acute anemia was caused by the failure of the hospital to properly attend a loss of blood following the removal of an umbilical vein cord; this expert

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[6] Putting the burden on Defendants is 180 degrees wrong under People v. Young 418 Mich 1, 21, 340 NW2d 805 (fn7) (1983). It was "patently incorrect" according to Young, fn 7, for Judge Youngblood to have placed the burden of showing that Doctor Gabriel was engaged in "Junk" or psuedo-science on Defendants; rather as the offering party, this impossible-to-meet burden belonged to Plaintiff who could show no scientific reliability or acceptance for this unorthodox methodology and could certainly demonstrate no arguable relationship with the undisputed facts.

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testimony could not be submitted to the jury, the court held, because the purported mental retardation allegedly caused from the blood loss could not be supported in the medical literature, was not recognized by responsible obstetrical spokespersons and was not validated in the medical literature, all deficiencies of which are distinctly present in this case.

As Daniels notes, even though Daubert may have eliminated the requirement that the scientific community must reach a "general consensus" as to an experts purported findings, the failure to reference any supportive body of scientific literature to substantiate the expert's view as well as the inability of the purported expert to adduce testimony which suggests that the medical condition has consequences which certainly follow[7], whether examined under Frye or under Daubert, such testimony of mental retardation based upon alleged expert causation testimony would not be submitted to the jury for a lack of reliability. In so holding, the Pennsylvania court ruled:

> "Plaintiff claims that her expert witness causation testimony satisfies the requirements of ...Daubert and Frye. This is untrue. Dr. Adler's testimony is that Roderick's acute anemia and absence of other problems could lead to the [mental retardation] difficulties claimed. However, this theory is not supported by a significant number of medical professionals.[8] Dr. Adler did not offer any evidence that his theory was supported with respect to acute anemia. The [single] article that Dr. Adler did rely upon dealt with the defects of long term iron deficient anemia which is not the same as acute

[7] Again, consider the Gatewood and Gabriel "Alphonse-Gaston" routine.

[8] Here certainly Amici Curiae do not support Dr. Gabriel's counterintuitive views in any way.

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> anemia suffered by the plaintiff and he presented no other evidence relating to acute anemia. This is not merely an oversight, since the doctor was specifically asked to address the difference between the two types of anemia." (310a-314a)

In another Frye jurisdiction, a patient suffered a heart attack within a few days after taking the drug "viagra" and brought a products liability action against the drug's manufacturer. Medical causation testimony was, as here, at the core of the liability suit. Before trial, defendant brought a Frye request to determine whether the medical causation expert testimony was admissible. While noting that Daubert rejected the Frye rule in favor of a "reliability standard" derived from FRE 702, Selig v Pfizer, 713 NYS2d 898 (2000) held that when it is demonstrated, as here, even in a Frye jurisdiction, that the theories of plaintiff's experts are not generally accepted in the scientific community, when there are no publications which support the proffered testimonial view and when the experts do not adduce any clinical studies in favor of their position, the lack of scientific methodology justifies a "reliability-style" rejection of the evidence, even under the Frye rule. Selig v Pfizer, 713 NYS2d 898 (2000).

In this case, Honorable Carole Youngblood declined to order a Davis/Frye hearing, inexplicably so, given the hopelessly counterintuitive[9] views of Dr. Gabriel and, in turn, Dr. Gatewood.

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[9] This writer calls such wild expert "proofs" by the sobriquet of "Lunar Fromage" testimony because if the expert witness says that the moon is made of green cheese, indeed, in some Courtrooms, it becomes a triable issue of fact for the jury as to

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In the way that this Court was unable to ascertain the validity of novel scientific testimony without a proper hearing which could only be obtained upon remand to the trial court who was instructed to conduct one, People v Young, 418 Mich 1, 340 NW2d 805 (1983), Judge Youngblood was candidly, taking the Path of Least Resistance in accepting plaintiff's version of the fact relating to expert testimony without the required antecedent Davis Frye hearing. Worse yet, Judge Youngblood put the burden of proof and persuasion on Defendants, (32a-45a) (T 6 pp.8-20) which is exactly wrong ("patently incorrect") under fn 7 of People v. Young at 418 Mich at 21.

Which leads us to our second analysis point. MRE 702, effective on March 1, 1978, determines reliability as a vital concept in passing upon whether **recognized** scientific, technical or other specialized knowledge will assist the trier-of-fact to understand the evidence or determine a fact in issue. How could Judge Youngblood possibly grant her judicial imprimatur as to the "After-You-Alphonse-No-After-You-Gaston"[10] routine of Drs. Gabriel

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whether, indeed, Moon Rocks will taste like Jarlsberg. There is a reason why the People v Young line of cases insist that the trial judge keep a "gatekeeping" function on such wildly novel "scientific" theories. Without it, our trials evolve from contests of fact to become dramas of who has the more theatrical and entertaining experts. To repeat, if the expert is guilty of "junk science", it can be said without fear of contradiction that the Trial Judge and the Court of Appeals is guilty of "junk law" in refusing to endure the ennui-driven task of a Davis Frye/Daubert hearing to test the reliability of the advanced theory or whether they have any real relationship to the true facts of the case.

[10] For the reader old enough to remember Vaudeville as reconstituted on the Ed Sullivan Show, Alphonse and Gaston were those mercilessly polite actors who were hopelessly immobilized in

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and Gatewood without such a prior hearing, or, more pointedly, in light of the **billions** of normal births on Planet Earth which take place every half-generation of mothers in Ms. Craig's birthing state, with her wide-open canal, how can it be said that the "pelvic grinding" thesis of Dr. Gabriel could, indeed, be anything other than ipse dixit testimonial advocacy of the worst stripe?

B: COMPARATIVE STUDY OF MRE 702, 703, DAUBERT AND MCLA 600.2955

Under MRE 702, the Rule of Evidence in place when this case was tried, the following was the rule:

> "If the court determines that recognized scientific, technical or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience or training, may testify thereto in the form of an opinion or otherwise."

Effective January 1, 2004, MRE 702 now reads:

> "If the court determines that scientific, technical or other specialized knowledge will assist the trier-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise (1) if the testimony is based on sufficient facts or data (2) the testimony is the product of reliable principles and methods and (3) the witness has applied the principles and methods reliably to the facts of the case."

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refusing to act out of the fear of going first to the offense of the other. So equally mired in protocol they were, to the point that no one ever went through the door, including the murderously angry people trapped behind them in this hilarity, that nothing, nothing ever got done. So, if Dr. Gatewood saw hypoxia but deferred to the pediatric neurologist Dr. Gabriel who did not, but who saw "pelvic grinding" for an obstetrical opinion that Gatewood did not, this amounted to an Omnia Saecula Saeculorum circular tautology that spun its way to the Jury, despite its totally speculative nature. Ed Sullivan was entertainment. This is the deadly serious business of adjudicating whether these medical defendants continue to practice medicine or operate as hospitals.

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The text of the rule which will be effective January 1, 2004 is certainly more emphatic in the evidentiary "fit" requirement of Daubert that the testimony be based on sufficient facts or data linked to the actual facts at the trial, of course, and is certainly more crystallized on the necessity for reliable principles of science and methodology and that the principles and methods are reliably "fit" to the facts of the case.

But is there a marked difference in important fundamentals between MRE 702 as drafted before September 1, 2003 and MRE 702 as will go into effect January 1, 2004? We think not.

FRE 702 is substantially similar to the parallel Michigan rule, except, of course, the words. "the court determines that recognized..." are missing from the federal Rule. But this is of no consequence, as Daubert construed FRE 702 as always requiring the Trial Judge to exercise a "gatekeeping role" in determining both the reliability and relevancy of the expert testimony proffered under FRE 702 and no one claims that MRE 702 is a departure. Daubert, 509 US at 589.

For its part, the Common Law of Michigan has always been that the facts and data upon which an expert basis his or her opinion must be **reliable**, Anton v State Farm Mutual Automobile Insurance Co., 238 Mich App 673, 677-678, 607 NW2d 123 (1999), as well as sufficient to meet tests of scientific trustworthiness and reliability. Tobin v Providence Hospital, 244 Mich App 626, 624 NW2d 548 (2001).

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Reliability has always been at the core of what MRE 702 was all about. In Nelson v American Sterilizer Company, 223 Mich App 485, 566 NW2d 671 (1997), a plaintiff's expert's opinion that her liver disease was caused by repeated exposures to a fumigant was not derived from recognized scientific knowledge and was deemed not to be reliable. Nelson, 223 Mich App at 491-492.

Is the same concern for reliability at the core of MRE 703? The former version of MRE 703 states:

> "The facts or data in the particular case upon which an expert basis an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence."

While certainly the concepts of reliability would require any prudent trial judge to insist upon the facts in the case being explicated to the expert before an opinion was made, the text of that rule did, indeed, seem to broaden the ability of the expert to speak to the case without the necessity of evidence formally being entered before advancing an opinion - - as long as the facts were finally admitted. On September 1, 2003 the Michigan Supreme Court tightened up this unpalatable legal fluidity with the present rule, effective September 1, 2003:

> "The facts or data in the particular case upon which an expert basis an opinion or inference **shall** be in evidence. This rule does not restrict the discretion of the trial court to receive expert opinion testimony subject to the condition that the factual basis of the opinion be admitted in evidence thereafter." (Emphasis supplied).

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There is nothing in the former version of MRE 703 or the current version of MRE 703 which justifies a conclusion that experts like Gatewood and Gabriel may float above the trial like Banquo's Ghost, unconcerned by the laws of evidentiary gravity or proper proofs of real facts before he or she speaks to "expert" observations which are, at bottom, not bordered by what the evidence actually says. This rule has been a Common Law rule for many years, long before the Michigan Rules of Evidence, thereby evincing a studied focus of the Courts of Michigan to insist that the expert always, always be corralled by what the proofs at trial actually show.

In one of the very first opinions that the Michigan Court of Appeals ever wrote, the Court ruled that an expert's testimony is properly excluded when it contradicted the eyewitness testimony of virtually all of the witnesses in the case; the contrary **opinion** evidence was excluded under the rule that the expert may not outrun the witnesses to achieve a favorable opinion based upon nonexistent facts. Rockey v General Motors Corp., 1 Mich App 100, 104, 134 NW2d 371 (1965). That holding was made forty years ago and the "fit" with the facts has never been abolished for the expert to offer **opinion** testimony.

Long before the Michigan Court Rules were ever adopted, the Michigan Supreme Court and the Michigan Court of Appeals both made clear that an expert's opinion could not outweigh actual testimony so that favorable assumptions govern the case rather than what the

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proofs actually entailed. Wyatt v Chosay, 330 Mich 661, 48 NW2d 195 (1951); Carmichael v Village of Beverly Hills, 30 Mich App 176, 186 NW2d 29 (1971). Since the Michigan appellate courts of this state for at least over fifty (50) years have always insisted that experts hew to the actual facts of the case, the only reason that MRE 703 appears to have been changed is to heighten **reliability** expectations in expert evidence.

But what of Daubert's quest for **reliability** in expert opinions? In truth, the Michigan legislature expressed its views as to MCLA 600.2955(1) which went into effect March 28, 1996 in what is clearly been determined to be an expression of legislative approval of Daubert for implementation in Michigan. This statute is parallel for Daubert. Greathouse v Rhodes, 242 Mich 221, 238, 618 NW2d 106 (2000). As Greathouse notes, the language of that statute establishes the Legislature's intent to assign the trial court the role of determining, pursuant to the Daubert criteria, whether the proposed scientific opinion is sufficiently reliable for jury consideration. Worse yet, Judge Cooper clearly acknowledged that the very thrust of MCLA 600.2955(1) and the attempt by the Legislature to codify that statute and Daubert albeit as to cases filed on and after March 28, 1996 were parallel attempts to state the law; still, notwithstanding Greathouse, Judge Cooper saw no role, in footnote 5 of her opinion, to worry about whether the proposed scientific opinion of Drs. Gabriel and Gatewood were sufficiently reliable for jury consideration. Such

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cynical scienter and circumvention of legislative intent by an appellate judge is, frankly, not commendable.

For over fifty (50) years, there has been an obligation on trial courts, generally, and Appellate Courts, specifically, to implement reliability into opinions of experts. No radical departures from this rule has existed in the span of two (2) generations by any legal authority. The quest for reliability is as firm under MCLA 600.2955(1) as it is in Daubert, as it is in MRE 702, however constituted, and MRE 703, however framed. For over fifty (50) years, the Michigan Supreme Court has declined to allow experts to delve into opinion testimony which is unrelated to the actual facts of the case. Wyatt v Chosay, supra, 330 Mich App at 671.

CONCLUSION

There is no reason to believe that any of the strictures placed upon expert opinions by the Michigan Legislature or by the Michigan Appellate Courts have ever been lessened to allow what took place in this case: the testimony of Dr. Gatewood and Dr. Gabriel to coalesce in a complete, internal inconsistency based, upon all else, on Dr. Gabriel's view that the child ground its head or pounded its head on the mother's pelvic rim. Gabriel refused to be bound by the undisputed facts: Gabriel refused to let the truth get in the way of a good expert's dramatic performance.

Both Dr. Gatewood and Dr. Gabriel had no explanation for the fact that the mother had previously given birth to larger children

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and, consequently, scientifically speaking, there was no CPD disproportion, even if too much Pitocin was administered. Furthermore, Gabriel and Gatewood refused to speak to the contrary fact that the child's APGAR scores were absolutely normal. Except for the concern regarding the delay in birth, and the use of Pitocin, there was nothing remarkable about this birthing. For Dr. Gabriel to insist that the mother's pelvic rim caused a pounding of the head, but to cheerfully admit that he was not qualified to testify as to that obstetrical area of expertise, means that the testimony became an unfunny Alphonse-Gaston comedy submitted to the jury as a complete speculation. We hope that the Supreme Court of Michigan will see that its inexorable justice role is to correct this travesty by the granting of a Judgment Notwithstanding the Verdict on appeal.

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RELIEF

WHEREFORE, Defendants-Appellants Elias Gennaoui, M.D. and Associated Physicians, P.C. pray that this Court grant Judgment Notwithstanding the Verdict on appeal or, in the alternative, grant a new trial as to all parties and all issues, together with costs of the appeal.

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